one, there was no objection to the process. Number two, there was no petition for relief in any way, shape or form; and number three and, most importantly, they voted and they consented with their feet and they consented to the process with their feet. Not necessarily to what anybody would say in that process but to the process itself, because they utilized it and action speaks louder than words is the ultimate consent.

Why? Why would they do that? Well, perhaps for the same kinds of reasons that Mr. Monk touched on and perhaps others. He said, well, people expected you to be impartial. I think that was the expectation. I think there was a further expectation, which is that precisely because you didn't have a significant background, you were a new face, you had an unbelievably important appointment in charge of five cases, had enormous visibility, that's why everybody showed up. Everybody was dying to knock on your door in order to tell you their vision of the world for their clients. They thought it was to their advantage and they were content, and we know about how time has passed on the focus on the Grace case, the committee, the unsecured creditors committee never voiced an objection ever. The movants in the Grace case never objected.

Even when they filed their motion to recuse the Court, they took the position that ex parte contacts were

not the issue in the case. They said the issue in the case is structure. The ex parte contacts are simply ancillary to that and main point, when they sought their petition for writ of mandamus, again, they didn't argue the ex parte point in the proceedings on remand back down here in this court. Again, they didn't take that position.

And now for the first time when they submit a brief they drop a footnote saying, oh, by the way, we're now going to make a 455(b)(1) argument.

And today Mr. Mancino spent his whole time almost not talking about the structural issue anymore but talking about 455(b)(1), and he's compounded the problem by making a misrepresentation in his papers. He says in his papers that he cites is the affidavits -- he cites the affidavits for the proposition that while some parties would --

THE COURT: Where are you reading from?

MR. BERNICK: Reading from his brief at page 35.

THE COURT: Yes. You see, one of the problems I have, and I'll get there, is I've not read the brief because I was not afforded a courtesy copy.

MR. BERNICK: He says finally the Grace movants have not acquiesced in the Court's ex parte contact with non-neutral advisers or any other party for that matter. While some parties have known there would be ex parte communications, the Grace movants themselves were not

involved in the case when any such disclosures were made, and he cites the Wills declaration exhibit JJ.

If you go to that declaration, it's a bunch of affidavits and not one of those affidavits speaks to the question of whether the movants knew about the ex parte process. Those affidavits all go to the point where the movants are saying they didn't know about the alleged conflicting appointments. None of them say that they weren't aware of the ex parte process. Mr. Mancino doesn't say that he wasn't aware of the ex parte process.

There's no record before the Court that says that somehow they were in the dark and, yet, they're still misrepresenting it to the Court, and Mr. Mancino today very carefully got up and he said my clients didn't know. He never says that he didn't know.

All of this, all of this delay, all of this kind of being careful about the affidavits, no explanation for it, these people aren't being candid with the Court. They're asking the Court to be candid and they're not being candid with the Court.

Let's talk a little bit about the advisers. Advisers, we knew that there were going to be on the 28th, we learned who they were going to be. I've got four points to cover and I will have to move through them very quickly.

First let's talk about the composition. An

important point has been made, this is not just one adviser, these are five advisers, and because there are five, you have the opportunity for balance. You've got judges. You've got Francis McGovern, who is an academic and a unique academic. We've got a practitioner in the field, Mr. Gross. There's a tolerance when you have a group for diversity of opinions, there's a tolerance for people to already have predispositions. You're not depending on one person, it's all five.

And who are you picking? You're picking people who are people of distinction, people who understand the importance of the integrity of the process.

Beyond their diversity, the reason I put this over here like this, beyond the diversity, the key thing is their disciplines. What disciplines were they from? These were not technical advisers in the sense of people who had the ability to provide actual evidence to the Court that might bear upon substantive issues. They're not like a technical adviser who's an engineer in an engineering case and who could actually serve as a witness.

They're judges and lawyers. Judges and lawyers inherently can't actually offer evidence to the Court. All they can do is talk with the Court about what somebody else has done and what is it that they talked about, what was the reason that they were there, their discipline was that

history of asbestos litigation and case management of asbestos litigation, key, key area for the Court, one they could specifically address.

Now, counsel says, oh, well, gee, but they went beyond that and they advised the Court with respect to this long laundry list of issues that are all substantive issues that are contested in the case, whether to convene a Rule 706 panel, whether and, if so, how to impose a bar date, the use of particular types of proof of claim forms.

What counsel doesn't realize and doesn't understand is that that's not something that's new. That has been a central focus of the bankruptcy cases since the Babcock & Wilcox case was filed in 2000. There have been massive briefs submitted. There are briefs submitted in the Grace case about all of those issues. Were the advisers not supposed to read the briefs about case management? Is your Honor not supposed to read about case management? That's what they were there for.

They weren't there to provide the Court with evidence. They were there to provide the Court with history and with case management.

What about the process? Well, your Honor should have done this and your Honor should have done this and that, etc., etc., etc. The Reilly case is clear on process. It says two things. One is it says that there are certain

procedural safeguards that should be adopted and the other says that somebody who doesn't object to the way that it's done, they waive their objections.

And what was done here? Your Honor identified the advisers. Your Honor gave the opportunity. If they wanted to pursue relief, God knows they had two years to do it. Your Honor described what they were going to do, maintained a log, and after the fact your Honor asked for affidavits. You can't go to Reilly and find that really more was required. You can't find it. And in any event, Reilly is crystal clear where those safeguards weren't in there, the guy wasn't even identified, that if somebody objected, they had to object then.

Well, your Honor did all these things with these advisers, didn't have written descriptions up front, didn't have recorded proceedings. Where was Mr. Mancino? Where was the unsecured creditors committee? They were where the government was in the Reilly case. They sat on their rights and they did nothing and Mr. Mancino can't even tell you today what the appropriate safeguards would have been. He doesn't know. Process is a dead issue.

Then we get to bias; three people, McGovern, Hamlin and Gross. The case on bias with Professor McGovern is frankly, your Honor, is laughable. The idea that Francis McGovern could go attend a meeting with a bunch of futures

representatives and that shows that he's biased, of course he's going to be there. He wants to know what they're saying, what they're doing, just like he goes and visits constituencies all over the country. He is a reporter. He should be there. He doesn't represent them. He doesn't get paid by the Court for acting on their behalf. They are not clients. He's there to learn.

The only thing that's really been said that changes that calculus is that Eric Green had the grace and presence and perhaps wit to say "our mentor", our mentor. Well, the very articulate and capable guy at this table, Steve Neal, he's my mentor, and you can see that it's done absolutely no good in getting me to agree with him all the time.

The fact that Francis McGovern is a mentor enhances and recognizes his stature. It didn't somehow give him a bias or represent a conflict of interest.

Let me go to Hamlin and Gross. With respect to Hamlin and Gross, the claim is G-1. Now, what did they do with G-1. Hamlin was more explicit about it, Gross was less explicit about it, but they basically walled themselves off of giving substantive advice with respect to personal injury, and my brief, I'm happy to be quoted in my brief for things that I said that are wrong, but at least when it's quoted, it ought to be for the right proposition.

I said there's no contrary evidence for what

proposition, it says Mr. Gross and Judge Hamlin repeatedly and consistently testified that they provided no advice to this Court and undertook no responsibilities for any issue related to personal injury claims or in potential conflict with their roles in G-1, and there was no contrary evidence and there's still no contrary evidence.

In fact, the kinds of things that get cited here actually cut the other way. There are a citation in BB, exhibit BB to the Kensington brief, that's the typewritten version of a dialogue involving Mr. Gross and the Court and other folks, and it's interesting, Mr. Gross is alleged to have agreed with the certain proposition relating to the underlying scientific evidence.

What you find throughout is Mr. Gross is doing one thing. He's asking questions. How are these cases tried? What's the science?

The one page, which is DRG 000643, what they quote is basically people saying you don't need to show plaques to make a meso claim is of Gross agreed with that, but it's clear from the margin it says DG and BK, and the quote is not from Gross specifically, and there is a question, what is indication of meso. Well, was that Gross's question? Was it Gross's answer? They never asked him that question in his deposition. They're misleading the Court concerning the evidence.

In any event, whatever the situation was with Gross and Hamlin in terms of whether that was an effective wall, the fact remains as demonstrated exhaustively in the briefs, their other role was well-known. It was well-known to the unsecured creditors committee, it was well-known to Deutsche Bank, who showed up actually at a Mealey's conference where Judge Gambardella sat on the sample panel as other folks. It was quite clear that Hamlin was a futures representative, Gross was the counsel of the other case. It was known to the Klehr, Harrison firm and it's never been denied. Mr. Mancino has never submitted an affidavit. He's filed affidavits. Still, even after discovery is done, he's never submitted an affidavit saying his firm wasn't aware of it at the time.

So, that then brings me to the ultimate issue, which is whether this whole system of advisers creates an appearance of impropriety, and here I agree completely with Mr. Monk, although with a slight modification. He says the conduct of the movants is the best indication that there's not a problem here. I would say it differently. I would say it's the conduct of counsel in this case that provides the overwhelming and unequivocal evidence that there was no appearance of impropriety or bias or conflict.

Who am I talking about? We're not just talking about ordinary practitioners of bankruptcy. We are talking

about the dons of the New York bankruptcy bar, people who are the gray-haired eminences, people that even with my involvement in these cases for the last four years I never had the privilege of meeting. People like Mr. Case, is one of the dons of the practice. Mr. Kruger, I guess he's not here anymore, another don. There he is, another don of the practice, and gray hair is not necessarily the only mark of that. Mr. Eckstein is exemplary evidence that you don't need to have a lot of gray hair to be considered the don of the practice.

All of these people knew generally early on that there was this situation, this dual role that was being played allegedly by Messrs. Hamlin and Gross and nobody cared to do anything about it. Why? They didn't see that it was a problem. And even when we, that is Grace, applied to have Mr. Gross serve as the futures representative just this last fall, nobody came to us and said, he can't do that, he's conflicted. Nobody came to us and said Mr. Hamlin can't do that, he's conflicted. Nobody filed, when we proposed Gross, recusal motions, even though it was known that he played the role in G-1.

And beyond those individuals, I don't mean to single them out, that's not the essence, I have nothing but respect for all the people I've named and they know it, I would go beyond to the entire audience of 280 plus people

who were sitting out there that day on December 20.

The entire bar that was involved in asbestos bankruptcy sat there, listened to the Court, saw who the advisers were and they reached the judgment that there was not even the appearance of impropriety. The evidence is unequivocal and it's overwhelming.

THE COURT: Do you remember the rest of the day, December 20? Do you remember the rest of the day?

MR. BERNICK: There was --

THE COURT: Private individual meetings --

MR. BERNICK: There were five individual meetings.

THE COURT: -- with each case where probably 40 or 50 people were there. The Court discussed how it was going to case manage --

MR. BERNICK: That's right.

THE COURT: -- and try to find out what the --

MR. BERNICK: That there would be conferences, indicated a second time there would be ex parte conferences. I do not recall one objection.

I want to talk about three specific issues that have been raised with respect to the advisers; personal injury, settlement, and there was one further one that my notes will refresh me on in a moment, oh, yes, the opinions that were written. Let me just briefly cover these.

The claim is made that Gross and Hamlin went beyond

their roles, did become involved in providing advice regarding personal injury. As I talk about it, I don't think there's any evidence on the record to support that, at least in connection with the Grace case.

There's a claim that Mr. Hamlin walked over the line when he got involved in fraudulent conveyance. That ended up being the number one issue and maybe counsel wasn't there, didn't know it, but the person -- the people who made fraudulent conveyance in the Grace case the number one issue were the folks over here, was Mr. Inselbuch and his clients, who insisted it be the number one issue, and they had good company because they're people who actually had prosecuted fraudulent conveyance litigation both before and during the early stages of the Grace case.

That was not something that, some bright idea that came out of the blue for Mr. Hamlin. They say that they crossed the line, that is, Gross and Hamlin did. I believe that their efforts and their testimony indicates otherwise.

There's an issue that's been raised with respect to settlement discussions and in the Owens Corning case that there was an improper divulgence of information. These are all discrete issues they affect particular cases.

The settlement discussions problem, if there was a problem in the Owens Corning case, Mr. Monk asserts and argues, well, that there was not. It's not Grace's

business, in any event.

There wasn't any problem that we're aware of in connection with the Grace case of settlement information making its way to the Court improperly. Indeed, in our first meeting with the Court, we shared settlement information directly.

There's a question that's been raised in the briefs about the opinions that were written or were drafted for the Court's review, actually were drafted at the direction, the testimony goes, of Mr. Wohlforth and not with direct contact with the Court at all. There was some draft opinions. It's quite clear from the record that none of those draft opinions related to personal injury claims at all. None of those draft opinions were central to these cases at all.

Two, three other things and then I'll sit down, by way of reference. One, the application to appoint Mr. Hamlin as the futures representative, it's really interesting. This was the essence of the arguments that were made by Mr. Mancino. When the papers were first filed, the Court did allow documentary discovery into those matters.

The documents were produced by our firm and by my client. Those documents demonstrate unequivocally that there was no impropriety. They further demonstrate that there was no objection to these individuals on the grounds

that are now being pursued. The only footnote is that after the close of discovery, Mr. Mancino and his client have seen fit to offer an affidavit of a Mr. Yuslov. Okay. Mr. Yuslov attaches what appear to be notes of a conversation that he had with Mr. Siegal. This affidavit is late. It's not part of the discovery process proper. It was attached to briefs. We haven't had the opportunity to respond and, in any event, it doesn't cure the problem, which is that Mr. Yuslov wrote that affidavit or attested to that affidavit without the proper opportunity for cross examination.

The affidavit is hearsay. The underlying notes probably have three or four layers of hearsay. They shouldn't be considered by the Court and we reserve the right to object to the documents that were tendered in connection with the briefs.

Number two, an issue was raised regarding the discoverability of settlement discussions. We took the position in this proceeding that the settlement discussions were not only inadmissible, they were immune from discovery, and I made reference to a Sixth Circuit case. That case is the Goodyear case, 332 F.3d 976. And finally, out of an abundance of caution, one of the briefs that was filed, I believe, from the creditors committee in the Armstrong case said, well, gee, all these cases are interlinked and the Third Circuit has said this, because of its decision

allegedly in Combustion Engineering, to delay the argument on the pending appeal.

That kind of statement is very corrosive. I think it's very much a mischaracterization of what the Third Circuit has done, but it probably does underscore the importance in this case of the Court making clear that the system of advisers and the ex parte procedures that were announced on the 20th of December were confined to these five cases. They were never adopted in connection with the CEABB case, that that case only came to the Court after the record was closed, no new facts were taken in that case, and in all of the documents that were produced by the advisers, none of them reflected that they undertook any activities as advisers to the Court in connection with that case.

I think it's very important to make clear why it is that that case is on a very different tract, on a very different circumstance, and that's all I have. Thank you.

THE COURT: Thank you, Mr. Bernick. Ms. Parver.

MS. PARVER: Thank you, your Honor. Your Honor, I would just like to take a few minutes to talk about the futures reps because the movants here, particularly Kensington and D.K. Acquisition, claim that the Court's impartiality might reasonably be questioned because of the presence of Messrs. Hamlin, Gross and Professor McGovern at certain of the meetings of future reps appointed in

bankruptcies across the country, and these included futures reps in the Owens Corning and the USG case.

Now, they argue that somehow, and they suggest that the futures reps were discussing, they were taking positions as a group on all of the key issues in the five bankruptcies and that somehow Hamlin and Gross were, and this is to use their words, plotting litigation and legislative strategies with the federal reps in these cases while at the same time advising the Court on the same issues.

Now, they argue this but, as your Honor, I'm sure, knows well at this point, there is not a shred of evidence in the record to support these contentions.

What did the future reps discuss? Absolutely they discussed various proposals for federal asbestos legislation, including whether to present their views as a group to Congress.

Now, Mr. Gross testified he never said a word on the legislation because he wasn't conversant with it. Judge Hamlin testified his contribution took at best 90 seconds to the group and that concerned whether his views that using a single Article 1 court where people sitting on it had to live within a 50-mile radius of Washington, D. C. was just not practical, and Professor McGovern testified that he never offered any views on any features of the legislation. He never offered any guidance to future reps on what

positions they should take, and his contribution, as Mr. Monk and Mr. Bernick have said, was to report on the legislative proposals and where they were in the process.

The movants' briefs are just absolutely inaccurate in describing these meetings. But you know something, your Honor, what does discussions of federal legislation, asbestos legislation, have to do with the issues in the five cases assigned to this Court? Absolutely nothing. Whether the legislation passes and in what form it passes are not issues that this Court is going to be deciding. They have nothing to do with the merits of these cases.

Now, what else did these futures reps discuss? They discussed, and the record again is very clear, they discussed issues of common interest. What process should they use to pick trustees for the 524(g) trust. What about claims processing facilities. Let's hear from people like that. Nothing to do with the underlying merits of the cases. Everything having to do with what happens after a 524(g) trust is set up. And they discussed TDPs, trust distribution procedures, and we know that the TDP is the mechanism that distributes the value to the present and to the future claimants after, and that's very significant here, after that value has been allocated to the trust.

Now, that's got nothing to do with the underlying issues in the cases before this Court because it has nothing

to do with what's the amount of value that's going to be allocated to the trust. It's the amount of value that the commercial creditors here care about. They want to know how much they're getting as opposed to how much the tort claimants are getting, and that's not what was discussed at the future rep meetings.

What did Judge Hamlin testify was discussed? He was discussing how are we going to deal with that ACC in the various cases, because they're talking about a trust distributions procedure that allocates value between present and future claimants, and how do we ensure that the future claimants are going to be treated substantially similar to the present tort claimants. So, did they talk about unimpaireds? Absolutely. The record shows in the context of the TDP how were the future unimpaireds treated vis-a-vis the presents, how are the unimpaireds treated vis-a-vis the impaireds.

The testimony of Judge Hamlin, Mr. Gross and Professor McGovern concerning these meetings is consistent and it's uncontradicted. They never plotted litigation strategy in any of these five cases. They never considered, counseled or advised the Owens Corning or USG or Armstrong futures reps concerning issues or strategies in these particular cases. They never discussed issues such as asbestos bar dates, claims estimations or product

identifications at these meetings, and the record is crystal clear that they never reported the content of these meetings to this Court.

In fact, Judge Hamlin testified the last time he spoke or met with this Court was May 17, 2002, and the first futures rep meeting that he attended was August 2002.

THE COURT: I'll also take notice, Miss Parver, of your cross examination of Mr. Gross commencing on 389 through 391, as to what he didn't do.

MS. PARVER: And I thank you, your Honor. I would also call the Court's attention to pages 29 to 30 of our consolidated brief in which we cite the fact that Owens Corning futures rep, Mr. McMonagle, detailed fee statements which were actually served on and received by the CSFB as the agent for the Owens Corning bank group, the Owens Corning creditors committee and D.K. Acquisition, specifically set forth futures rep meetings with futures representative Hamlin, futures rep meetings with Mr. Gross in the presence of Professor McGovern, and they detailed all the issues that were discussed there.

THE COURT: Mr. Crames.

MR. CRAMES: Your Honor, I have one issue I want to address in the few minutes allotted to me. Mr. Bernick, in his inimical fashion, has stolen some of my thunder but I want to pick up on the point he made which concerned, of

course, the roles of the advisers, and I think it's very important for the Court to understand that even though Kensington, at page 45 and following of their brief, use the term disinterested, which is a defined term in the Bankruptcy Code in connection 101(14), and reference 327(a), professionals and trustees and examiners appointed under 1104, whatever the advisers rolls may be, they most assuredly are none of those. They are not retained 327(a) professionals. They are most assuredly not trustees or examiners.

Your Honor has quite wisely and properly give them discrete roles in each of the five cases, and I think Mr. Bernick has very thoroughly covered the ground. The point being the whole disinterestedness notion is inapplicable and irrelevant to these advisers.

But what does it say. Assuming even for the sake of argument that one wanted to refer to it to see whether these advisers met the test, do they have an interest, materially adverse to the interests of the estate or as class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in the debtor or in an investment banker, which is irrelevant entirely, I submit they meet the test.

What did they do in G-1? What does a futures rep do? Miss Parver explained what the futures reps meetings

were all about. That's what Mr. Hamlin's charge is. That's what Judge McMonagle's charge is. That's what Judge Trafelet's charge is. The allocation of value to the trust is a negotiation in the context of a Chapter 11 and my view of the whole Chapter 11, your Honor, frankly is it's one grand effort to settle and resolve by means other than litigation. Yes, there are litigations along the way, but it's one grand settlement vehicle. That's the thrust of the whole statute.

The value once assigned is then distributed and the main job of the futures rep frankly after the value for the trust has been allocated is the negotiation with Mr. Inselbuch and his asbestos claimants committee over how that value gets distributed, and that was the main purpose of the futures reps getting together.

Who are their clients? Who are the clients of a futures rep? We don't know. There are no people that we can point to today and say they are our clients. The day they appear and become people, we can point to, they become Mr. Inselbuch's clients and they're represented by his committee.

So, to talk in terms of overlapping clients between Mr. Hamlin being the futures rep in G-1 and being an adviser here is, again, an irrelevancy, inapposite and totally misunderstands what futures reps do.

THE COURT: Are you counsel for the futures reps in all five jointly administered cases?

MR. CRAMES: No, I'm not, your Honor. Only in three. Only in Owens Corning, Armstrong and USG.

THE COURT: Okay. And I believe in Armstrong there was a trust disposition plan.

MR. CRAMES: A plan provides for -- there's a 524(g) trust. Judge Newsome made findings of fact, conclusions of law and entered an order of confirmation which abides the approbation of your Honor, at least the district court, in order for it to become a final and binding and efficacious order.

THE COURT: So, there's been no trust distribution plan in Owens Corning or the other case that you administer and no allocation or discussion of funds until that occurs.

MR. CRAMES: There is a trust distribution procedure that has been negotiated in Owens Corning, your Honor, and it will be incorporated in the plan that ultimately is put before the Court, and it has been filed.

THE COURT: All right. Thank you.

MR. CRAMES: Thank you, your Honor.

THE COURT: Mr. Inselbuch please.

MR. INSELBUCH: Thank you, Judge. I have a few miscellaneous points to touch on that come largely out of the briefs that have been filed.

THE COURT: Can I ask you one question, only follow-up to Mr. Crames that I didn't ask him. As far as my recollection goes, I had nothing to do with the allocation in Armstrong or the TDP in Armstrong between current and futures. Is that correct?

MR. INSELBUCH: Clearly so, not to my recollection. I fought that out with Mr. Crames.

THE COURT: Without the assistance of the Court. Correct?

MR. INSELBUCH: Without either the benefit or the burden of the Court.

THE COURT: Thank you. I accept that, by the way.

MR. INSELBUCH: In some of these briefs, the parties have argued that the 455(b)(1) point is conceded by the Court because they say the Court has conceded that it received extra-judicial information.

Now, I don't know what extra-judicial information means other than anything that the Court hears I guess not in this room and not on the record. If that's true, then every court is always getting extra-judicial information. But that's not what 455(b)(1) talks about.

What 455(b)(1) says, there should be recusal where the judge has personal bias or prejudice concerning a party -- which has never been asserted here -- or personal knowledge of disputed evidentiary facts concerning the

proceeding.

You're the judge about whether anybody gave you evidentiary facts. I suspect, based on the conversations that I've had with the Court and with others, that what you heard was a whole lot of lawyer talk about what the lawyers thought was important and what they thought they would be able to prove. There's been no evidence suggesting that you saw any witnesses or you saw any factual evidence or documentary evidence that might implicate 455(b)(1).

Now, they also -- now, what's interesting to me is when this began, we began with Mr. Brodsky saying, my goodness, I didn't know about Judge Hamlin and Mr. Gross's appointments in G-1, and that came to my mind and that's a conflict, and then everybody piled on and Mr. Neal piled on, but he couldn't say that because he knew the record was to the contrary about his knowledge and USG's knowledge about the G-1 situation appointments, so, he piled on and he said, oh, my goodness, there's this problem with ex parte conversations, and said we couldn't have consented to that because you said you used them only sparingly.

Well, I don't know what sparingly means and now everybody seems to say they were innumerable.

Well, I went through the Court's records and I went through Mr. Neal's materials and in the two years, as far as I can tell from the court records, there were 21 meetings

that the Court held ex parte, and if you attribute those 21, and that includes ex parte conversations with other debtors. If you look at just the USG case and assume that every time that the Court was meeting with a plaintiff that was attributable to the USG case, there were 13 such meetings, five with the plaintiffs, three with the unsecured creditors committee, one with the debtors, and then I might say two other days when the Court had all the constituents in court and met seriatim with the various constituencies, including Mr. Neal; one meeting with a combined PI and PD constituency, one meeting with the unsecured creditors and the plaintiffs, and three meetings with insurance companies if they were involved in the USG case.

There were also two meetings with Owens Corning, the debtors, one meeting with the Armstrong debtors, three meetings with the Federal Mogul debtors, and when you add this all up, you get 21 meetings.

Now, Mr. Neal puts in a piece of paper. He says, ah, you left some out and if you add in one, two, three, four, five of the ones that he says you left out, two of them were with plaintiffs, one is with a debtor, and one is with an insurance company. But then he goes on to say, which I found quite troubling, that you left out a meeting with Mr. Gross and the asbestos plaintiffs' lawyers for 12 hours in Chicago.

Now, I think I would have known about that, and I have asked the plaintiffs' lawyers and they don't recall this Court ever coming to Chicago for any meeting of any kind in this case, and certainly not a 12-hour meeting with the plaintiffs' lawyers in Chicago.

Now, the citation for this --

THE COURT: Chicago isn't big enough for Mr. Bernick and I to be there at the same time.

MR. INSELBUCH: The date of this is September 14, 2003, and the citation for this, which I think is telling, is an entry for Mr. Gross's diary, his time records that says travel to a meeting in Chicago re working committee, no reference to the Court. Although there are references to the Court in his time records whenever they were appropriate.

THE COURT: I will tell you for the record the Court never traveled to Chicago.

MR. INSELBUCH: I was confident of that, Judge, and I would just say that it is incorrect to say that, oh, my goodness, this whole case was run based on these ex parte conversations. In fact, in two years the Court had at most 26 which, by my calculation, is a little more than one a month, and they ran for the most part an hour or less.

Now, what do the Grace petitioners now say, what do the Grace committee now say and what do the Kensington

petitioners now say. They were able to make up the facts before and they were able to say anything they wanted in their recusal papers and in their petition for mandamus, but now we have a record and I think it's telling that Mr. Neal only wanted to talk to you for five minutes so he could run away from the record and claim that that's what we were doing.

But, in fact, what everybody now seems to argue is the two years that have gone on here while everybody understood exactly how these cases were being run, while everybody participated in the way these two cases were being run, that's irrelevant because Grace petitioners say, well, we didn't know about some of these things. And why is that? Because they deliberately tried to insulate themselves as they say in a footnote so that they can continue to trade in the stock. The committee, the Grace and USG committee, they say, and by the way, the Grace petitioners say at page 36, if anybody wants to check me, the committee at page eight says it doesn't matter what the committee knew, it didn't matter what the committees' lawyers knew, so long as there was one unsecured creditor that didn't know about this, that's enough, and we can raise it at any time on their behalf, but the ultimate, the ultimate statement is the Kensington petitioners' at page 51 of their brief, they say that there's no timeliness issue, there's no waiver issue,

there's no acquiescence issue, whatever you want to call those things, because all parties who might be interested in seeking recusal would have to be aware and on notice.

Now, if that -- I can't believe that that could be the law. I can't believe that. And indeed, it is incorrect that, as they said earlier, that the acquiescence or timeliness doesn't apply to 455(b)(1)as well as to 455(a), and for that I would just comment, you could look at the material at page 64 of our brief that follows on that, but if that were the law, look at the power I would have.

I've got 200,000 blue-collar workers. I venture to say very few of them follow these proceedings with any detail, and if I could, I could proceed here in what is a bankruptcy where, as Mr. Crames aptly states, the goal is to reach a consensual resolution, a consensual reorganization in each one of these five cases, and I could make whatever deals I want, but then if I want to walk away from those deals or walk away from my consents or walk away from my acquiescence, I go find one, one injured asbestos worker and he says, well, I didn't sign on for that.

That simply can't be the law. That can't be the law when we talk about what a reasonable observer knowledgeable of the facts would know and how they should act.

And finally, Judge, you asked about motives. Who's

here and who's not here I think is telling. Federal Mogul, Grace, Armstrong and Owens Corning, four debtors do not support recusal. And in Owens Corning Mr. Monk said what was really going on. Why is there only part of the commercial creditors, the unsecured creditors committee, advancing this motion. What points out more telling than anything the tactical nature of what's going on. The banks are here yelling for recusal. The bonds are not. And why is that? That's because Mr. Brodsky perceived that he was likely to lose or feared he would lose the substantive consolidation case and had to find some way to prevent reorganization in Owens Corning on the chance that he might succeed, that his constituency might succeed in Congress.

As you're well aware, your Honor, the bonds are on the other side of that issue. Now, whether their decision not to participate here is tactical or not, I don't know. But it certainly points up the tacticalness of what's going on here.

Now, how could you cure this? People talked about curing this problem. They said you could cure this with disclosure. Well, what disclosures, what additional disclosures would be made? It strikes me that you could always find things that were not disclosed in a manner that parties will argue they should have been disclosed in, but there was no lack of disclosure of the appointment of Judge

Hamlin in G-1, there was no lack of disclosure of the hiring of Mr. Gross in G-1, there was no lack of disclosure of the appointing of your five advisers in this case.

I mean, people want to argue that somebody should have filed another piece of paper and should have filed another piece of paper in another court house, and in a perfect world, I guess when you go back and look at how a record could be made so that it was absolutely perfect, you could suggest other ways to do things. We can do that in every case.

But your Honor was charged with a very difficult problem and your Honor adopted a strategy for dealing with that problem. You adopted it in sunlight transparently. Everybody in this room could have come here in 2002, after they thought about it for a while, even if they didn't object when you announced it at first, even when they didn't object when you held them in the court, when you held separate conversations with the Court with each constituency in each case in the courtroom, even if they didn't do it right away, at any time within a reasonable period of time they could have come into this court and said this, we don't agree with this, we don't consent to this, we don't think this is proper.

They didn't do that. They didn't do it for two years and it's too late, whether it's acquiescence or

whether it's waiver or whether it's timeliness or whatever else you want to call it, this is just playing with the Court. This is playing with the Court, playing with the facts for tactical advantage and my clients have to stand by now for four and a half months waiting for this to get decided. Thank you.

THE COURT: Thank you. All right. I indicated that I'd permit people to make application for reply. I'd ask for a proffer if you're going to do it, Mr. Robbins, to make sure that we are not just embellishing that which has passed on the record.

MR. ROBBINS: Your Honor, I think every point I will make is either one Mr. Englert would have gotten to if he had had time and yet has not been made or is responsive to arguments that you just heard.

THE COURT: All right. I'll permit you to have ten minutes.

MR. ROBBINS: Thank you, your Honor.

THE COURT: You're welcome.

MR. ROBBINS: Let me proceed quickly and start with the issue of timeliness. Our position today is that only actual knowledge triggers the duty to bring this motion under 455(a). The argument on the other side turns on a series of imputations, and I think it's important to nip this in the bud because it would make unprecedented and

quite erroneous law if the Court were to subscribe to it.

Here is the chain of imputations that respondents ask you to draw. First they ask you to infer from one young associate knowing about Judge Hamlin's appointment as a result of his clerkship, that is supposed to be imputed to a partner at Kramer Levin. From there it's to be imputed to the entire firm.

THE COURT: I didn't hear that argued today. What I heard argued today was that Mr. Becker, a member of that firm who worked in the Owens Corning case, was also on the equity committee in the W.R. Grace case, knew of Gross and Hamlin's appointment in G-1.

MR. ROBBINS: No one at Kramer Levin knew of those dual roles. There was no such evidence. The argument in the brief, as I say, is a chain of imputations that begins with this associate Klein. It goes from there to Eckstein; from Eckstein to the firm; from the firm to CSFB as the agent; from the agent imputed yet again to Mr. Brodsky's firm.

THE COURT: I understand that. I read Mr. Eckstein's testimony. I read all the briefs. Your argument is imputations are inappropriate and I understand that. Let's go to your next.

MR. ROBBINS: Five layers of imputations, your Honor, is the kind of chain of logic that would make even

Mrs. Palsgraf blush. Let me move to the second point.

No one, not a soul, reported to this Court the bid and asked price for the bank debt in 2002. There is no evidence that that happened. I report from my clients, though I was obviously not in the case then, that it did not happen but, your Honor, it is exactly the byproduct of a system of ex parte communications and the absence of a record that would understandably make it impossible to reconstitute those events.

That is, of course, exactly why proceeding in this way, no matter how much the nature of the case cries out for thinking outside the box, that cannot be abided.

THE COURT: Mr. Robbins, when the status conferences were held in open court, and there were a number of them, there's some, maybe between 20 and 40 persons here, if you put a reporter down there at the time that you hold those status conferences, no one will deal with the issues effectively or tell you what they're really thinking. If there's a record, the record hinders, doesn't help, case management.

MR. ROBBINS: Your Honor, I agree with one thing Mr. Bernick said with regard to that, if it is true, that cases like this require us to depart so dramatically from settled principles of advocacy to subscribe to the proposition that your Honor just said is required, that is,

I suppose for the Third Circuit to say. No court has ever intimated that it is permissible, not in this kind of a case or not in the many, many other kinds of complex cases that go on under other sections of the United States Code and, so, the suggestion that we need to create new rules for this set of cases I think is one to which the Court of Appeals and, respectfully, your Honor should not, ultimately subscribe.

THE COURT: No. This Court and potentially the Court of Appeals will have to address the issue because the issue is not clear-cut, as somebody indicated before.

MR. ROBBINS: Let me turn very quickly in my allotted time to a couple of other quick points.

THE COURT: Sure.

MR. ROBBINS: First, I don't propose to go nip and tuck with opposing counsel on what people's motives were, what their tactics are, what theories or strategies they have and, fortunately, the Third Circuit has said that that is neither my burden, nor their opportunity, nor this Court's province, and an opinion by Judge Garth in Alexander against Primerica holds, he said, as follows, this is 10 F. 3d 164, quote, "By the same token, we have no need to address the issue of whether petitioners and their counsel have abused the judicial process by acting in bad faith, as that issue is similarly irrelevant to the 455 issue with

which we have been confronted. Protecting important institutional values against the appearance," appearance, "of partiality does not require us to affix blame. Rather, the appropriate and the only inquiry to which we must respond is whether a reasonable person knowing all the acknowledged circumstances might question the district court judge's continued impartiality."

Now, your Honor, I've heard it suggested that as of December 2001, the die was cast, and I expect that's probably right. I expect that was indeed the moment when this Court proceeded down the path that brought us to the elaborate diorama that counsel introduced today, and I've heard a number of, I will concede, out-of-the-box suggestions about how this Court's advisers can be, I've heard it said today that they need not be neutral because, after all, how could you find anybody who's neutral.

Well, your Honor found Judge Dreier and there's no suggestion that he's not neutral, and I doubt --

THE COURT: I think the discussion was not advisers but we were talking generally about people engaged in asbestos litigation in terms of experts, difficult to find neutrals.

MR. ROBBINS: I could have sworn Mr. Monk said advisers need not be neutral, he's not seen any authority that requires. Then I heard it said perhaps they need only

be balanced, they don't have to be balanced, they don't have to be neutral as long as you have enough on each side. Then I heard it said maybe that you only need to be neutral about new issues but not issues as old as Babcock & Wilcox.

That's not the law. The law is this Court's advisers must be neutral on any matter on which they advise the Court for a variety of overlapping and mutually reinforcing reasons.

Your Honor, this record cannot be read fairly in any other way than that the advisers you appointed for multiple reasons were indeed conflicted, that the conflict runs to this Court and that under settled principles of 455(a), I respectfully submit your Honor, as unpleasant as the duty, you have no choice but to recuse yourself, at least in Owens Corning and I would submit in the other cases as well.

THE COURT: Okay. Thank you, Mr. Robbins. Mr. Mancino, briefly.

MR. MANCINO: Yes, your Honor. I'd just like to briefly address Mr. Bernick's attempt to satisfy his burden of showing that we waived our objections on timely -- our untimely asserting our objections by saying that we have not proved a negative, and I'll just take a few minutes.

THE COURT: Go ahead.

MR. MANCINO: I should have expected that my name

would be used in vain and I was thinking about this last night as I was flying back to the United States from Switzerland, and I regret that I didn't have the opportunity to read Mr. Bernick's brief because I suspect he made these arguments in it. However, he seems to suggest, your Honor, that the burden was on me and my clients to prove the negative; that is, that we did not waive our objections or that we were timely.

Well, the fact is, Mr. Bernick had an opportunity during the discovery process to question me under oath because he specifically asked for my deposition.

THE COURT: As far as I know, your deposition was not taken.

MR. MANCINO: You're right, your Honor. Mr. Bernick also requested the deposition of a person most knowledgeable about my client. Well, I was prepared to come in here, I think it was on Monday, for that, to have to enjoy a day in court with Mr. Bernick asking me questions, but it was Mr. Bernick who said, your Honor, we don't need his deposition. So, whatever opportunity Mr. Bernick had to develop evidence --

THE COURT: And by the way, wasn't that vice versa at first? Didn't you want Bernick's deposition and then abandoned it?

MR. MANCINO: I think there's an element of tit for

tat in his request, I agree, your Honor. But he had an opportunity to elicit evidence from me and from our clients under oath and he elected not to do it, so, it's I think inappropriate for him to suggest that your Honor should not consider a document that we did produce in discovery and an affidavit that my client did submit, which indicates that in the process of Grace putting forward Judge Hamlin as a futures rep candidate, my client was told by Mr. Bernick's client that Mr. Bernick was contacted ex parte by your Honor and your Honor urged Mr. Bernick to appoint Mr. Hamlin and, according to my client's notes which were produced during discovery, Mr. Siegal told him that Mr. Siegal or Grace was going to pass on Hamlin until Wolin called him, Judge, it says Wolin, I would have said Judge Wolin, called Bernick.

Now, had he wanted to, Mr. Bernick could have asked questions about this document that was produced in discovery. He chose not to. It's an admission against interest on the part of his client. We have an affidavit supporting it, affidavit, it's admissible.

THE COURT: Do you know when the Grace bankruptcy was filed; how many years it was pending?

MR. MANCINO: I'm sorry?

THE COURT: Do you know how many years it was pending?

MR. MANCINO: It was pending for some several

months before your Honor was --

THE COURT: Several months?

MR. MANCINO: It was sometime in 2000.

THE COURT: By the time of that affidavit, is that Mr. Yuslov --

MR. MANCINO: Yes, it is.

THE COURT: -- the Grace bankruptcy had been pending almost two years or longer.

MR. MANCINO: Probably.

THE COURT: The Court said to all parties, Mr. Inselbuch, Mr. Bernick, it's time to appoint a futures representative because at that time Sealed Air had been completed, Fresenius had been completed, Judge Fitzgerald was about to complete the Taconite issue with the home insulation. It was time to move on with the case and have a futures representative because you couldn't move on without one.

MR. MANCINO: Undoubtedly, your Honor. However, the candidate was Judge Hamlin, who was a futures rep in G-1, a supposedly neutral adviser to your Honor and no one, no one appreciated the conflict and the problems that that presented. The debtors didn't, Judge Hamlin didn't, your Honor didn't. We did. We opposed it. The U.S. Trustee opposed it. I believe the committee for unsecured creditors opposed the Hamlin application and Judge Fitzgerald said no

way is he qualified to be a futures rep in this case and denied it.

Now, it's also suggested that our clients, as Mr. Bernick put it, voted with our feet in endorsing the case management structure that we are complaining about now. Well, we did not vote with our feet, your Honor. My clients, and we have affidavits in the record before the Third Circuit and they're available to your Honor as well, in which we make it clear, and your Honor has acknowledged this, that my clients did not partake of ex parte communications with the Court, my firm did not partake of ex parte communications with the Court, and I made it clear to the Third Circuit that we didn't appreciate what was going on in this case until this issue regarding your disqualification came to our attention.

THE COURT: Did you make it clear to the Third Circuit that the creditors committee, who really speak for people that have debt, knew what was going on?

MR. MANCINO: No, I did not, your Honor.

THE COURT: Mr. Kruger is sitting back there, who you can hardly see, knew very well what was going on with the creditors committee not only in Grace but USG, and sought the access to this Court on a number of occasions.

MR. MANCINO: Well, the Third Circuit --

THE COURT: You just can't hide on that. You can't

hide.

MR. MANCINO: I don't think anyone is hiding about that, because those parties that participated in the ex parte communications --

THE COURT: Your two particular clients, where they say they never met with me, that's true. I did not know who they are. They never requested it, neither did I.

MR. MANCINO: Yes. And your Honor, I think it's inappropriate that the price of admission to these bankruptcy cases is that in order to get our voices heard, we have to ask for ex parte communications with the judge. That is not how the process should operate, I respectfully submit. Thank you, your Honor.

THE COURT: Okay. Thank you. All right. Anyone else?

MR. NEAL: Two minutes or less, your Honor.

THE COURT: Sure, Mr. Neal. You didn't use your full time.

MR. NEAL: I wasn't trying to hide it. First of all, your Honor, I'm not running from the record. It would be more tempting to say I'm running from the snow and the cold but I'm not really doing that, either, your Honor.

Our brief lays out as thoroughly as we can at this point what we think the record shows and I don't think it would be a proper imposition on the Court to reiterate that,

so, we stand by what we say in the brief.

Our brief, when you read the brief, you'll see it does not suggest, it does not say you were at that Chicago meeting for 12 hours.

THE COURT: I read your brief. I did not see it.

MR. NEAL: Again, there's an appendix that list various items, but again -- I'm obviously not going to take on most of what Mr. Inselbuch argued, even though I disagree with virtually all of it, but for one point of clarification on the record, actually will ask the Court this question. Mr. Inselbuch says that, I think he said that in the USG case there was a day when all parties were here but your Honor met with parties individually seriatim.

I don't believe that happened in the USG case. Your Honor may have a different recollection but I don't think that happened in USG. We had the January '02 meeting and I don't think we had another session ex parte with the Court even as part of a day-long program.

THE COURT: We met several times, tried to work out the claim form with the bar date.

MR. NEAL: With everybody present. Okay. So, am I -- is your recollection then the same as mine? I don't recall another session where we were ex parte.

THE COURT: You're asking me to recollect over two years five jointly administered cases whether there was

another conference with you?

MR. NEAL: Just so there's no -- so, for the record, on that point Mr. Inselbuch's recollection is different. I don't think that occurred in USG. It may have occurred in others.

And then finally, your Honor, Mr. Bernick says I was his mentor, and just so there's no doubt on the part of anybody in the courtroom, I want everybody to know I'm proud of that fact.

THE COURT: Mr. Monk.

MR. MONK: No, your Honor.

THE COURT: Ms. Parver?

MS. PARVER: No, your Honor.

THE COURT: Mr. Crames?

MR. CRAMES: No, thank you.

THE COURT: Mr. Bernick?

MR. BERNICK: I have just one technical point which I guess not to give it more distinction than it deserves but kind of sounds parallel to Mr. Robbins' complaint about imputation which I don't think really are essentially based on but, in any event, Mr. Mancino wanted me to take his deposition so that I could ask him about somebody else's affidavit which talks about what that individual heard from -- allegedly heard from my client, which my client allegedly had heard from me which I allegedly heard from you.

Now, anybody knows that there's an evidentiary problem with that chain, and everybody knows that you can't cure that problem with an affidavit. The fact of the matter is this was hearsay as an affidavit. To ask Mr. Mancino about it is more hearsay and that the affidavit itself is multiple layers of hearsay.

If they want to establish as a fact that some alleged impropriety or improper contact was made by your Honor, there are a lot of different steps they have to go through and the Yuslov affidavit is not only late but it doesn't solve the problem.

MR. MANCINO: Your Honor, and of course, we did try to get Mr. Siegal's --

THE COURT: Mr. Mancino, you only get one reply. You only get one reply. Yes, Mr. Inselbuch.

MR. INSELBUCH: One point. No matter what Mr. Neal wants to say now, the material filed with the Court is filed under the following heading. Judge Wolin's log does not, italicized, include the following ex parte communications which are recorded in recently produced documents or the advisers' bills. The last bullet point, September 14, 2003, meeting with Gross and asbestos plaintiffs' lawyers for 12 hours in Chicago.

MR. NEAL: I know there's one that either does not indicate you were there. The other items we identified you

were communications party --

THE COURT: Mr. Neal, we heard you. Let me ask the parties. I think the other day I found the diagram that I used on December 20. Would people like a smaller copy of it, I think we made so that we can send it out to you.

MR. NEAL: So we can impeach Mr. Bernick.

MR. BERNICK: Only if mine was right.

THE COURT: Does anybody care about the diagram?

MR. NEAL: I'd like one.

THE COURT: If you don't, we'll just leave it. I was going through a room, you know, and there was a diagram there and it was reflective of your diagram.

MR. BERNICK: I would like a copy of that diagram.

THE COURT: I think the artistic content of mine was better.

MR. BERNICK: I'm sure.

MR. INSELBUCH: I would suggest you insert it in the record, your Honor.

THE COURT: You know, everybody is talking about mentors here and though I know Judge Gibbons is adverse to me here today, the only time I sat in the Circuit Court of Appeals was on a court where he presided and I watched him as he presided in the many cases that came before the Court and at the conclusion of most he said, I'll take this matter under advisement.

I, too, will take this matter under advisement. You will hear from the Court, as you all know, there's a mandate from the Circuit Court of Appeals that I reply by or that I issue an opinion by January 31st. Rest assured we will meet that commitment. Court will be in recess. Thank you for coming.

(Whereupon the proceedings are adjourned.)